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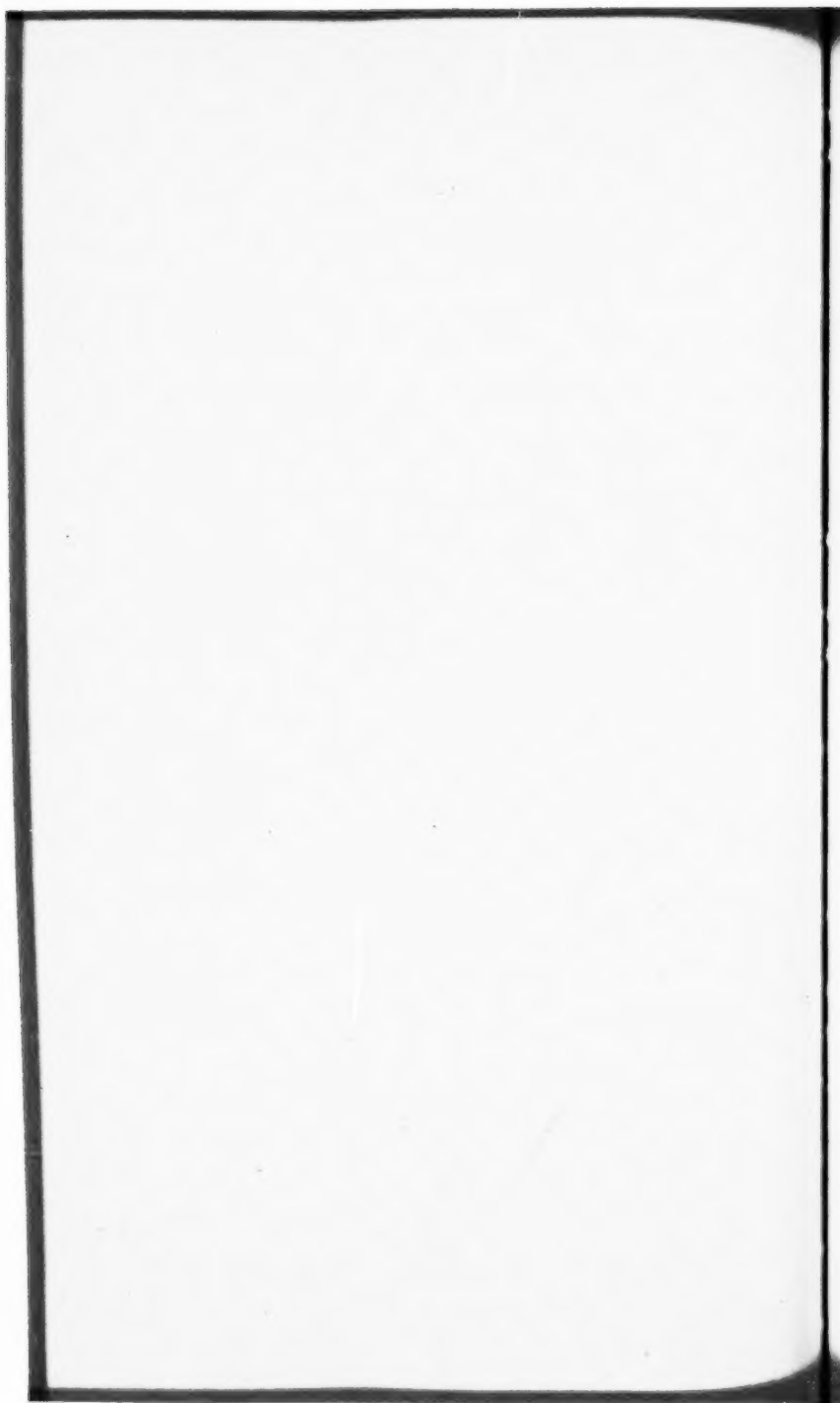
THE SUPREME COURT OF THE UNITED STATES

Chief Justice of the United States

Associate Justice of the United States
District Court of the United States
District of Columbia, September

Supreme Court of the United States
District Court of the United States
District of Columbia, September

Supreme Court of the United States



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In the Supreme Court of the United States

October Term, 1948.

No. 463.

WABASH RAILROAD COMPANY, a Corporation, *Petitioner*,

vs.

THE HONORABLE RICHARD M. DUNCAN, a Judge of the
United States District Court for the Western
District of Missouri, *Respondent*.

RESPONDENT'S BRIEF IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI.

*To the Honorable Chief Justice and Associate Justices
of the Supreme Court of the United States:*

I.

OPINION BELOW.

The opinion of the United States Circuit Court of Appeals is *Wabash Railroad v. Duncan*, 170 F. (2d) 38, reported in Advance Sheets of Federal Reporter (2d).

II.

JURISDICTION.

The judgment of the Circuit Court of Appeals was entered on October 15, 1948 (R. 23). The petition for writ of certiorari was filed on December, 1948. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by Act of February 13, 1925. (28 U. S. C. A. 347 (a).)

III.

STATEMENT OF CASE.

The facts in the case at bar, so far as material to the questions here involved, are accurately stated by Judge Thomas in the opinion rendered by the Circuit Court of Appeals, Eighth Circuit, and appearing in the transcript of the record at pages 22, 23 and 24, and in the case of *Wabash Railroad v. Duncan*, 170 Fed. (2d) 38, l. c. 39, so further statement is dispensed with.

IV.

SUMMARY OF ARGUMENT.

1.

The United States Court of Appeals, Eighth Circuit, did not abuse its discretion in refusing the writ of prohibition in this cause because the court did not decide any

important question of local law in conflict with the applicable local decisions.

(a) The petition in condemnation was filed to condemn two one hundred foot sections of petitioner's right-of-way south of the railroad embankment for the purpose of constructing a ring levee to close an opening in the railroad embankment. Respondent found as a fact "that the construction of the proposed levee will not materially interfere with the operation by the defendant of its railroad" (Tr. 12). This finding was required as a condition precedent to the condemnation. (Section 1512, R. S. Mo. 1939. See appendix, page 14.) Any damages sustained by petitioner would have to be paid. (Section 1508, R. S. Mo. 1939, appendix to petitioner's brief, page 34.)

(b) Section 12519, R. S. Mo. 1939 (see appendix, page 11), clearly authorized the condemnation of the petitioner's right-of-way for the building of the ring levee, provided, of course, it does not materially interfere with the use of the railroad property for railroad purposes. (Section 1512, R. S. Mo. 1939, appendix, page 14.) The case of *Houck v. Little River Drainage District*, 343 Mo. 28, 119 S. W. (2d) 826, does not decide to the contrary. The basis of the decision in that case is that the district had the right to condemn the land in question but did not do so.

2.

The United States Circuit Court of Appeals, Eighth Circuit, did not abuse its discretion in refusing the writ of prohibition for the following reasons:

(a) The issuance of the writ of prohibition by the United States Circuit Court of Appeals is only authorized where it is in aid of its appellate jurisdiction. The Circuit Court of Appeals is only authorized to exercise superintending control over the district court as provided by the Act of Congress. (28

U. S. C. A., Section 1291, Section 1651; *Wabash Railroad v. Duncan*, 170 Fed. (2d) 38, l. c. 40; *U. S. v. Mayer*, 235 U. S. 55-65.)

(b) Even if the United States Circuit Court of Appeals were bound to follow the procedure in the Missouri appellate courts, still the writ was properly refused:

(1) Because the United States District Court had jurisdiction of the cause and the right and duty to interpret Section 12519, R. S. Mo. 1939, and in that event prohibition would not lie. *State v. Mason*, 154 S. W. (2d) 67, l. c. 72, 348 Mo. 436, l. c. 446; *State ex rel. Drainage District No. 8 of Pemiscot County v. Duncan*, 68 S. W. (2d) 679, 343 Mo. 733; *State v. Beals*, 55 S. W. (2d), l. c. 1007.

(2) Prohibition is a discretionary writ, and where in a doubt exists, the writ should not issue. *State v. Harris*, 153 S. W. (2d) 834, l. c. 837, 348 Mo. 426.

(3) The cases of *Peters v. Buckner*, 288 Mo. 618, 232 S. W. 1024; *State ex rel. City of St. Louis v. Beck*, 333 Mo. 1118, 63 S. W. (2d) 814, are cases where the appellate court prohibited the lower court from giving erroneous instructions to the commissioners regarding the measure of damages in condemnation suits and are exceptions to the general rule. The case at bar does not fall within this exception.

V.

ARGUMENT.

1-(a).

The court did not decide any question of local law in conflict with the applicable local decisions. The petition in condemnation described two portions of the petitioner's right-of-way on the south side of the railroad embankment, each one hundred feet long, one on each side of the

railroad trestle designated as Bridge 518, to be used for the construction of a ring levee to prevent the overflow water from coming into the district through said trestle. It was held in the case of *Houck v. Little River Drainage District*, 343 Mo. 28, 119 S. W. (2d) 826, that no land is condemned except such as is described in the petition for condemnation.

The respondent in the instant case found as a fact "that the construction of the proposed levee will not materially interfere with the operation by the defendant of its railroad." Section 1512, R. S. Mo., 1939 (Appendix, page 14), required such a finding as the condition precedent to the condemnation of any railroad right-of-way. Any consequential damages sustained by the petitioner as a result of the taking of said right-of-way must be assessed and paid before possession can be taken of it. No reason is suggested why the construction of the statute by the respondent did not afford the petitioner every reasonable protection from loss, and no reason is suggested why railroad property should be exempt from condemnation any more than the property of any other person or corporation.

1-(b).

Section 12519, R. S. Mo. 1939, clearly authorized the condemnation of the petitioner's right-of-way. This section is given in full in appendix, page 11, and the provisions applying expressly to railroads are stated by the Court of Appeals in *Wabash Railroad Company v. Duncan*, 170 Fed. (2d) 38, l. c. 39.

Section 12519 is a part of Article 7 of Chapter 79 of the Revised Statutes of Missouri for the year 1939. In construing the same provisions in Article I of Chapter 79, the Supreme Court of Missouri, in the case of *Graves*

v. *Little Tarkio Drainage District*, 345 Mo. 557, 134 S. W. (2d) 70, said on page 76:

"A drainage district is a public corporation. Sec. 10745, R. S. 1929, Mo. St. Ann., Sec. 10745, p. 3472. A district is not a municipal corporation in the restricted sense of the term. Its purpose is to exercise governmental functions. *State ex rel. Hausgen v. Allen*, 298 Mo. 448, 456, 250 S. W. 905, 906; *State ex rel. Caldwell v. District*, 291 Mo. 72, 79, 236 S. W. 15. The drainage district law is a code unto itself, and the courts must follow the provisions of the statutes governing such districts. *State ex rel. Scott v. Trimble*, 308 Mo. 123, 134, 272 S. W. 66, 68; *in re Mississippi and Fox Drainage District*, 270 Mo. 157, 173, 192 S. W. 727.

(4, 5) All the terms and provisions of the drainage act should be 'construed broadly and liberally to effectuate the wholesome and beneficial motives which prompted its enactment.' *In re Big Lake Drainage District v. Rolwing*, 269 Mo. 161, 171, 190 S. W. 261, 264; *Wilson v. King's Head Drainage District*, 257 Mo. 266, 289, 165 S. W. 734, 740. Sec. 10808, R. S. 1929, Mo. St. Ann., Sec. 10808, pp. 3529, 3530, expressly provide that: 'This article is hereby declared to be remedial in character and purpose, and shall be liberally construed by the courts in carrying out this legislative intent and purpose.'"

The petitioner has laid stress on the words "across, through and over" as used in Section 12519, and draws the conclusion that "over" as used in that section means the same as across, although the word "over" obviously, when used in connection with the other portions of the sections, means, not across, but on or upon. The Supreme Court of Missouri, in the same case of *Graves v. Little Tarkio Drainage District*, 345 Mo. 557, 134 S. W. (2d) 70, said on page 78:

"In determining whether or not the board had authority to put said plan into execution requires a construction and application of the statutes heretofore referred to. 'It is an elementary and cardinal rule of construction that effect must be given, if possible, to every word, clause, sentence, paragraph, and section of a statute, and a statute should be so construed that effect may be given to all of its provisions, so that no part, or section will be inoperative, superfluous, contradictory, or conflicting, and so that one section, or part, will not destroy another.' Sutherland on Statutory Construction (2d Ed.) 731, 732, Sec. 380. Moreover, it is presumed that the Legislature intended every part and section of such a statute, or law, to have effect and to be operative, and did not intend any part or section of such statute to be without meaning or effect."

Not only does Section 12519 give the express power to condemn railroad right-of-way and fill (embankment), but such power is conferred in the general provision vesting the levee district with power of condemnation. 20 C. J. 605, Section 91, lays down the rule thus:

"In the absence of some statutory provision expressly or by implication forbidding it, property devoted to one public use may under general statutory authority be taken for another public use, where the taking will not materially impair or interfere with or is not inconsistent with the use already existing, and is not detrimental to the public. It is not material that some inconvenience may result to the prior occupant, if the conditions are such that the two uses can stand together. The rule that power must be conferred expressly or by necessary implication applies only where the second use will destroy or injure the use to which the land was originally appropriated."

Petitioner lays great stress upon the case of *Houck v. Little River Drainage District*, 343 Mo. 28, 119 S. W. (2d) 826, as holding that the district does not have the power to condemn the defendant's right-of-way and embankment. Respondent insists that this case really holds to the contrary. The first paragraph of the opinion is as follows:

"Plaintiff filed petition under Sec. 1347, R. S. 1929, Mo. St. Ann., Sec. 1347, p. 1550, to have damages ascertained for the alleged wrongful taking of her land by defendant. A demurrer to the petition was sustained, the petition dismissed and plaintiff appealed."

The section above referred to is the same as Section 1511, R. S. Mo. 1939, and is as follows:

"Sec. 1511. Who may have damages ascertained—proceedings.—In case property is to be, will be, or has been by any corporation damaged for public use, any person interested may have such damages ascertained. The proceedings for ascertaining and paying such damages shall be the same as are and may be provided by law for assessing damages which owners of land may sustain in consequence of its appropriation for railroad purposes."

The petition in the Houck case alleged that the plaintiff was the owner of a tract of land described in the petition, and along the west side of which was constructed what was known as the "Rock Levee Road"; that just east of the Rock Levee Road the defendant drainage district had in a prior condemnation suit condemned a strip of land for the Ramsey Creek diversion levee and the Ramsey Creek diversion channel; that the defendant drainage district was changing its plan and making a levee out of the Rock Levee Road and taking possession of the same,

destroying the public road and depriving her of the use and access to it *without paying her any compensation*. The opinion further states as follows:

"It is further alleged 'that defendant has not heretofore attempted to condemn plaintiff's said land lying in said Rock Levee Road nor to have plaintiff's said damages to her said remaining land assessed in any judicial proceeding and that this suit is brought for the purpose of having a judicial assessment and award of all such damages from such taking and damaging of plaintiff's said lands.'

The prayer of the petition is for the appointment of commissioners to determine and assess damages."

The defendant demurred to the petition on two grounds: (1) that by the prior condemnation of the strip along the east side of the Rock Levee Road, all of the rights of the plaintiff in the land occupied by the Rock Road had been extinguished; (2) that the section which is similar to Section 12519 authorized the drainage district to take the road without compensation. The court held that the petition stated a cause of action (1) because the condemnation of the strip on the east side of the road would not condemn any land not described in the petition. On this point the court said:

"Defendant makes no claim that the rock road right-of-way strip through plaintiff's lands was included by specific description in the condemnation judgment of 1912, but claims, as above stated, that by condemning the adjacent right-of-way of the Ramsey Creek diversion levee and channel, it acquired the right, when the occasion arose, to use this right-of-way strip of the rock road."

(2) The court further held that the district could not take possession of and use the road in which plaintiff

had a reversionary interest and destroy its use as a public road without paying damages to the plaintiff.

The quotations which are set out in appellant's brief are used with reference to the above facts and hold that the section which is almost identical with Section 12519, does not authorize the taking of the road without compensation. Petitioner ignores the portion of the quotation "without compensation." The very basis for the decision is that the drainage district had the right to condemn the roadway provided compensation was paid to those interested. The fact that the proceeding was brought under a section that is now Section 1511, R. S. Mo. 1939, shows that the drainage district had the right to condemn the land, otherwise the proceedings would not be authorized. The plaintiff sought to have the damages assessed as they would have been assessed in the condemnation proceeding.

It is therefore submitted, that under Section 12519, R. S. Mo. 1939, the petitioner was authorized to condemn the right-of-way of petitioner for the construction of the ring levee subject to the provision that it did not materially interfere with the use of the railroad for railroad purposes.

2-(a).

The United States Circuit Court of Appeals, Eighth Circuit, did not abuse its discretion in refusing to grant the writ of prohibition, because the issuance of the writ of prohibition by the United States Circuit Court of Appeals is only authorized where it is in aid of its appellate jurisdiction.

The Circuit Court of Appeals is only authorized to exercise superintending control over the district court as

provided for by the Act of Congress. While the District Court, in trying cases removed from the State Court on account of diversity of citizenship, is bound to follow the law of the local jurisdiction, this rule does not apply to the supervising control by the Circuit Court of Appeals. As to that supervision, the Circuit Court of Appeals is governed by the United States Code. *Wabash Railroad v. Duncan*, 170 Fed. (2d) 38, l. c. 40; *United States v. Mayer*, 235 U. S. 55, 59 L. Ed. 129.

2-(b).

Even if the United States Circuit Court of Appeals were bound to follow the procedure in the Missouri appellate courts, still the writ was properly refused. The United States District Court had jurisdiction of the class of cases to which the condemnation suit belonged and it had the right and duty to interpret Section 12519, R. S. Mo. 1939. In the case of *State v. Beals*, 55 S. W. (2d), l. c. 1007, the court said:

“Relators have an entirely wrong impression of the use of the writ of prohibition. In the case of *State ex rel. v. Tracy*, *supra*, loc. cit. 121 of 237 Mo., 140 S. W. 888, 891, 37 L. R. A. (N. S.) 448, the Supreme Court, after reviewing a number of authorities holding that a writ of prohibition is proper only to restrain a court from proceeding in a matter concerning which it is without jurisdiction, or in which it is about to proceed in excess of its jurisdiction, said:

‘Upon the foregoing authorities it may be safely asserted, as settled law and without exception, that unless the court sought to be prohibited is wanting in jurisdiction over the class of cases to which the pending case belongs, or is attempting to act in excess of its jurisdiction in a case of which it rightfully has cognizance, the writ will be denied.’ ”

In the case of *State v. Duncan*, 334 Mo. 733, 68 S. W. (2d) 679, in an opinion for the Supreme Court of Missouri, *en banc*, the court said on page 684:

“But, while we have thus ruled the merits of the controversy in harmony with the relator’s contention, it does not follow that our provisional rule in prohibition should be made absolute. There is no doubt about the fact that the relator district may ask prohibition, notwithstanding it is a stranger to the proceeding whereat the writ is aimed. *State ex rel. Darst v. Wurdeman*, *supra*, 304 Mo., loc. cit. 588, 264 S. W., loc. cit. 404; *State ex rel. Priest v. Calhoun*, 207 Mo. App. 149, 155, 226 S. W. 329, 331, 332. But prohibition is an extraordinary remedy available only when the lower court is proceeding without jurisdiction or in excess of its jurisdiction. *State ex rel. Hyde v. Westhues*, 316 Mo. 457, 469, 290 S. W. 443, 446. If it is acting within the limits of its jurisdiction, we cannot control its discretion or coerce a particular judgment through the issuance of a writ of prohibition. 50 C. J., par. 20, p. 665; *State ex rel. Hog Haven Farms v. Percy*, 328 Mo. 560, 574-575, 41 S. W. (2d) 403. The circuit court has undoubted jurisdiction to hear and determine the mandamus proceedings pending below, and while a judgment therein contrary to the ruling in this opinion would be error, the matter cannot be reached by prohibition, even though the relator is not a party to those proceedings and cannot appeal.”

The same conclusion is reached in the case of *State v. Mason*, 348 Mo. 436, l. c. 446, 154 S. W. (2d) 67, l. c. 72, where it is said: “The respondent circuit judges have jurisdiction to construe the charter, and so questions of construction are not determinative in the prohibition case here.”

2-(c).

Prohibition is a discretionary writ, and where doubt exists, the writ should not issue. In the case of *State v. Harris*, 348 Mo. 426, 153 S. W. (2d) 834, l. c. 837, the court said, "Prohibition is a discretionary writ and where any doubt exists as to whether, on admitted facts, a defective petition can be amended so as to state a cause of action, it should not issue."

2-(d).

There are no Missouri cases holding that prohibition will issue to prevent the appointment of commissioners in a condemnation suit. The cases of *Peters v. Buckner*, 288 Mo. 618, 232 S. W. 1024, and *State ex rel. City of St. Louis v. Beck*, 333 Mo. 1118, 63 S. W. (2d) 814, are cases where the appellate court prohibited the lower court from giving erroneous instructions to the commissioners regarding the measure of damages in condemnation suits, and are exceptions to the general rule. The case at bar does not fall within that exception, but is governed by the general rule stated in the previous points.

VI.

Conclusion.

The decision below is correct and there are no grounds for granting the writ of certiorari. The petition therefore should be denied.

Respectfully submitted,

WILLIAM A. FRANKEN,
First National Bank Bldg.,
Carrollton, Missouri,
Attorney for Respondent.

APPENDIX.**Section 1512, R. S. Mo. 1939:**

Sec. 1512. Appropriation of lands of corporations by other corporations.—In case the lands sought to be appropriated are held by any corporation, the right to appropriate the same by a railroad, telephone or telegraph company shall be limited to such use as shall not materially interfere with the uses to which, by law, the corporation holding the same is authorized to put said lands. Where no agreement can be made between the parties, the mode of assessing the damages provided heretofore, as to private persons, shall be adopted; and if the lands to be appropriated lie in more than one county, an application may be made in any one county in which any of the lands lie, and the damages shall be assessed as to all the lands of the defendant corporation along the whole line in one proceeding. (R. S. 1929, Sec. 1348.)

Section 12519, R. S. Mo. 1939:

Sec. 12519. Supervisors—powers and duties.—In order to effect the leveeing, protection and reclamation of the land and other property in the district subject to tax, the board of supervisors is authorized and empowered to straighten, widen, change the course and line of any levee in or out of said district; to fill up any creek, drain, channel, river, watercourse or natural stream; and to divert or divide the flow of water in or out of said district; to construct and maintain sewers, levees, dikes, dams, sluices, revetments, drainage ditches, pumping stations, syphons and any other works and improvements deemed necessary to preserve and maintain the works in or out of said district; to construct

roadways over levees and embankments; to construct any and all of said works and improvements across, through or over any public highway, railroad right-of-way, track, grade, fill or cut in or out of said district; to remove any fence, building or other improvements in or out of said district, and shall have the right to hold, control and acquire by donation or purchase, and if need be, condemn any land, easement, railroad or other right-of-way, sluice or franchise in or out of said district for right-of-way, or for any of the purposes herein provided, or for material to be used in constructing and maintaining said works and improvements for leveeing, protecting and reclaiming the lands in said district. Said board shall also have the right to condemn for the use of the district, any land or property within or without said district not acquired or condemned by the court on the report of the commissioners assessing benefits and damages and shall follow the procedure that is now provided by law for the appropriation of land or other property taken for telegraph, telephone and railroad rights-of-way.